IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.1835 OF 2005

IN

SUIT NO.1448 OF 2005

Katpadi Krishnarai Kamath ...Plaintiff

VS.

1. Harischandra Anant Pandit
and others. ...Defendants

Mr.S.H.Doctor with S.C.Gupte i/b. A.P.Rege, for Plaintiff.

Mr.P.K.Samdhani with Arvind Rathod, Ms.Sushma Kadam i/b. Arvind Rathod & Co., for Defendant nos.1 to 5.

Mr.Ravi Kadam, Advocate General with Harvindar Toor i/b. Mahimtura & Co. for Defendant no.6.

Mr.Sanjay Jain i/b. Vinod Mistry & Co., for Defendant no.7.

CORAM: D.K.DESHMUKH, J.

DATED: 5TH FEBRUARY,2007.

P.C.:

1. This notice of motion has been taken out by the plaintiff. By this notice of motion, the plaintiff is claiming temporary injunction against the defendants restraining them from transferring,

alienating, or creating third party rights or part with possession of the suit property. The plaintiff also claims for appointment of Court Receiver on the property.

2. The facts that are material and relevant for deciding this notice of motion are that the defendant nos. 1 to 5 admittedly are the owners of the property viz. Survey no.244(1a), 244(1B), 245(1a), 245(1b) and 252 at Mulund in Mumbai suburban district. The plaintiff alongwith two others entered into an agreement dated 15.11.1987 with the owners of the land. It was recited in the agreement that the plaintiff and two others who are described as developers in the agreement approached the owners with a request that they be permitted to develop the land and the owners agreed to grant permission to the said developers to develop the said land. In clause (4) of the agreement it was stated that the parties have expressly agreed that they shall enter into a regular agreement for development of the land. By clause (6) the owners had also agreed to execute a power of attorney in favour of the developers to do various acts, deeds and things that may be necessary for development of the said land. According to the plaintiff, there was another agreement arrived at

between the parties dated 14.5.1988 which is at "Exhibit B" whereby the plaintiff and two other persons who are described as developers in the agreement have agreed that the power of attorney executed in their favour by the owners is subject to the amount mutually to be agreed later on between the developers and the owners as against Rupees Twenty lakhs for the said land. It appears that the owners had given that land on lease to defendant no.6. It further appears that the land was subject to the proceedings under the Urban Land Ceiling Act. In those proceedings an order was made by the Government exempting those land from the provisions of the Urban Land Ceiling Act. That order was challenged by the defendant no.6 by filing writ petition no.3311 of 1988 in this Court. That petition was disposed of by the Division Bench of this Court by order dated 24.4.2001. By agreement of parties, Court set aside the order which was challenged in the petition. The Court directed the authority under the Urban Land Ceiling Act to consider the application submitted by the defendant no.6 under Section 20 of the Urban Land Ceiling Act for exemption of the land. The application submitted by the developers on behalf of the owners for exemption under Section 20 of the Act was withdrawn by the owners. According to the

plaintiff, there was an agreement arrived at between the plaintiff who was acting as an agent of the owners and the defendant no.6. According to the plaintiff, in terms of that agreement which is dated 26.3.2001 the plaintiff was to get the schemes submitted by the defendant no.6 sanctioned from the Authority under the Urban Land Ceiling Act. The plaintiff was also to get reversionary rights of the owners transferred in favour of the defendant no.6 and in lieu of the said services the plaintiff was to get benefits of the development rights including all permissible F.S.I. as per that agreement. The plaintiff in the suit therefore, firstly claims a decree of specific performance of the agreement at Exhibit A and Exhibit B, secondly decree of specific performance of the agreement dated 26.3.2001 which is in the form of consent terms. The plaintiff also claims for order of permanent injunction against the owners as also the defendant no.6.

3. The notice of motion is opposed by the defendants. They have filed their reply. The principal defences that have been raised by the defendants are:-

(i) that the agreement at "Exhibit A" is not the

agreement conferring development rights on the plaintiff, it was only a token or tentative agreement which contemplates that a regular development agreement would be entered into and therefore, a decree of specific performance cannot be granted in relation to such an agreement. It is submitted that even assuming that the agreement at "Exhibit A" is a development agreement, the settled law is that a decree of specific performance of development agreement cannot be granted.

(ii) According to the defendants, the agreement at "Exhibit B" is not an agreement at all and therefore, there is no question of any Court granting any decree of specific performance of such agreement. It is further submitted that a decree of specific performance of the agreement at "Exhibit V" viz. the consent terms also cannot be granted. It is submitted that by the consent terms certain benefits were agreed to be given by the plaintiff to the defendant no.6, firstly on his assisting the defendant no.6 getting a schemes sanctioned by the authority under Urban Land Ceiling Act and secondly making necessary arrangement for the reversionary rights of the owners in favour of the defendant no.6. According to the defendant no.6 instead of assisting

defendant no.6 in getting the schemes sanctioned under the provisions of the Urban Land Ceiling Act, the plaintiff had challenged the order that was passed in favour of the defendant no.6 with the result the land available for development was not reduced. It is also the case of the defendant no.6 that the plaintiff has taken no steps to transfer the reversionary rights in favour of defendant no.6. The defendant nos. 1 to 5 have transferred their reversionary rights in favour of a third party viz. Avadhut Properties Pvt. Ltd. It is also the defence of the defendant no.6 that the plaintiff could not have entered into the agreement with the defendant no.6 for securing benefits for himself because the only capacity in which he was acting in the proceedings before the High Court in the Writ petition is as a power of attorney holder of the owners, and therefore, any benefit that he gets would be on behalf of the owners, and those benefits he will be entitled to get only if the agreement at "Exhibit A" is capable of being specifically enforced.

4. I have heard the learned Counsel appearing for plaintiff, owners and defendants 1 to 5 and defendant no.6. Now to examine the first defence

raised on behalf of the defendant it is necessary to refer to the agreement dated 15.11.1988. In para (4) of that agreement the following recitals are relevant:-

> "It is hereby expressly agreed by and between the parties hereto that they shall enter into a regular agreement for development of the said land incorporating all the other terms and conditions agreed between the parties respecting the balance amount payable by the Developers and the mode and manner in which the development is to be undertaken by the Developers and the amount of Rs.10/- lakhs (Rupees ten lakhs) paid under this agreement shall be carried into effect in the said agreement as earnest money or deposit."

5. Thus, the above said recital makes it clear that the parties had not reached any final agreement either in relation to the consideration that is to be paid to the owners by the developers or in relation

to the mode and the manner in which the development of the land is to be carried out. It is an admitted position that the entire land was subject to the proceedings under the Urban Land Ceiling Act. It is also an admitted position that by the date on which the agreement was entered into neither any scheme was sanctioned in relation to the land nor was any order made exempting the land from the provisions of the Urban Land Ceiling Act. In this situation, therefore, it is obvious that the date on which the agreement was entered into between the parties, the parties did not know how much land will be available for development and therefore, it is not possible for the parties to reach a final agreement either in relation to the consideration or the manner in which the development would be carried out because for fixing the amount of consideration as also for deciding the mode and the manner of the development, it will be necessary that the parties know how much land is available for development. Apart from the above recitals, the correspondence on record also shows that the parties had not reached the final agreement. There is a letter on record dated 28.1.1989. This letter has been written by the plaintiff and two others to the owners in reply to their letters dated 28.11.1988 and 21.12.1988.

Perusal of letter dated 28.11.1988 shows that in that letter in para (2) it is clearly stated that what was entered into between the parties was a token agreement only. In para. (8) it is stated "You are requested to kindly confirm, in writing, within two weeks, whether you intend to continue or not the said agreement, since time limit of the token agreement is already over." This letter dated 28.11.1988, it appears, was received by the plaintiff on 30.11.1988. But he did not respond to it. Therefore, a letter dated 21.12.1988 was written by the owner. In that letter it was stated that in the absence of any reply from the plaintiff, the owners are in dark about their intention in respect of continuation or dis-continuation of the agreement dt. 15.11.1987. Those two letters are replied to by the plaintiff by his letter dated 28.1.1989. He specifically states in that letter that it is in response to the letters of the owners dated 28.11.1988 and 21.12.1988. He further states that "We have to state that after receiving your two letters all of us met and discussed the agreement of development between us and it was agreed that another agreement should be drawn up and the terms of the said agreement were discussed in accordance with the earlier agreement of 15.11.87 and the letter passed on by you to us during

May,1988." It was further stated that thereafter a draft of the said agreement was already handed over. It is further to be seen that though two letters which are under reply clearly describe the agreement at "Exhibit A" as a token agreement, the plaintiff does not raise any protest about that description. However, in the letter of the plaintiff dated 22.11.1988 the plaintiff himself has stated that he is ready and willing to enter into a final agreement. The paragraph (5) in that letter is relevant which reads as under:-

> "(5) In our last letter dated 22.9.88 besides requesting you since June/July 88 till date, we have been confirming our readiness to enter into final agreement and requested you for sending the copy of this agreement to the Income Tax authorities under section 37(i) of the Income Tax Act. We procured the necessary forms and arranged for the meeting between our Advocate Shri.B.H.Prasad Sarma and your Advocate Shri.C.D.Sheth and informed you too about the procedure that after the submission of the

> application in the proper form, it would take about 60 days time from the last day of the month in which the application was made to the Income Tax Department, to obtain the clearance so that once released by that Department, finality to the agreement could be given and necessary payments could be made to be mutually agreed upon and this period could have overlapped the other periods necessary for B.M.C. formalities so that productive work could be started on or before 7.3.89 as brought out in our letter of 22.9.88 addressed to you."

The plaintiff in the letter dated 28.1.1989 has referred to a drawn up agreement. A copy of that drawn up agreement has been produced on record. Perusal of that drawn up agreement shows that the basis of calculating the consideration to be paid to the owners is totally changed. In the agreement at "Exhibit A" to the plaint, at clause (2) it is contemplated that the consideration was agreed to be paid to the owners at the rate of Rs.275/- per square

meter whereas the drawn up agreement shows that the owners were to be paid lump sum amount. Thus, the material available on record clearly indicate, at least, prima facie that the agreement at "Exhibit A" was not a final agreement and was a tentative agreement arrived at between the parties and the only agreement which was reached between the parties finally was that after the other terms are settled between the parties the final agreement would be entered into. Therefore, in my opinion, the plaintiff would not be entitled to a decree of specific performance of the agreement at "Exhibit A".

6. In so far as the defence raised by the defendants that the agreement at "Exhibit A", even according to the plaintiff, is the agreement to develop the land and therefore, in view of the series of the judgments of this Court a decree of specific performance of such an agreement cannot be made, the learned Counsel appearing for the plaintiff submits that because after development the land was agreed to be transferred to the developers on lease, the agreement is not merely a development agreement. Perusal of the agreement, however, shows that there is no such condition contained in the agreement at "Exhibit A". I have already recorded my finding

prima facie that the agreement at "Exhibit A" is not the agreement to develop the land but it is only the agreement to enter into a final agreement to develop the land. The law as it stands today is that even if had the agreement at "Exhibit A" been an agreement to develop the land then also the Court would not have grant a decree of specific performance of such an agreement. In my opinion, therefore, it cannot be said that the plaintiff has strong prima facie case for getting decree of specific performance of the agreement at "Exhibit A."

7. So far as agreement at" Exhibit V" viz. the consent terms between the plaintiff and defendant no.6 are concerned, perusal of those consent terms shows that the defendant nos. 1 to 5 are not parties to those consent terms and the capacity of the plaintiff in so far as those consent terms are concerned was even according to the plaintiff is that of power of attorney holder of defendant nos.1 to 5. Therefore, the settlement that could have been reached by the plaintiff with the defendant no.6 can only be for and on behalf of defendant nos.1 to 5. If he wants to reach any agreement with the defendant no.6 for his own benefits, the defendant nos. 1 to 5 must agree to that in order that the agreement binds

them. It goes without saying that the defendant nos. 1 to 5 being the owners of the land any agreement of any nature entered into between the plaintiff and defendant no.6, the defendant nos.1 to 5 would be necessary parties and without their permission the agreement cannot be enforced. It is further to be seen here that one of the consideration for defendant no.6 to agree to confer some benefits on the plaintiff was that the plaintiff will make necessary arrangement to get the reversionary rights of the owners in favour of the defendant no.6 or his nominee. I have not been shown anything on record which will even indicate that after 26.3.2001 the plaintiff has made any arrangement to get the reversionary rights of the lessor in favour of the defendant no.6. On the contrary, it has been brought on record that the defendant nos. 1 to 5 who are the owners have transferred the reversionary rights in favour of a third party who is not before the Court. It was submitted on behalf of the plaintiff that the third party in whose favour the reversionary rights have been transferred by the defendant nos. 1 to 5 is the nominee of defendant no.7. But there is nothing placed on record to substantiate that claim. In any case as that party is not brought before the Court, it is not possible for the Court even to make

any inquiry in that aspect of the matter. In my opinion, therefore, due to above said two aspects alone it cannot be said that the plaintiff has strong prima facie case for a decree of specific performance of the agreement at "Exhibit V". In any case, the plaintiff could have entered into the agreement at "Exhibit V" only because of the power of attorney that was executed by the defendant nos.1 to 5 in his favour. That power of attorney was executed by the defendant nos.1 to 5 because of the agreement at "Exhibit A". As I have found that prima facie the agreement at "Exhibit A" appears to be a token agreement and not a final development agreement, without there being any final development agreement between the plaintiff and defendant nos.1 to 5, the defendant no.6 would not be able to claim any development rights that may flow to him under the agreement at "Exhibit V". I thus, find at least for these reasons that the plaintiff does not have prima facie case for getting a decree of specific performance of the agreement at "Exhibit A" as also the agreement at Exhibit V. Added to this, grant of decree of specific performance is always in the discretion of the Court, and therefore, merely because it is legal for Court to pass a decree of specific performance, Court is not bound to pass a

decree of specific performance. In my opinion, considering that the reversionary rights have admittedly been transferred by the defendant nos. 1 to 5 in favour of a person who is not before the Court, and considering the statement on behalf of the defendant no.7 that the defendant no.6 has transferred all his rights in favour of defendant no.7 and that he has already started development of the land and third party right has already been created by him, in my opinion, it cannot be said that the plaintiff is likely to get a decree of specific performance as sought in the suit. As I find that the plaintiff has not been able to make out a prima facie case, it will not be appropriate for this Court to grant any interim relief in favour of the plaintiff. The notice of motion is therefore disposed of.